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OIL COMPANY

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ALAMEDA

CENTER FOR BIOLOGICAL
DIVERSITY, and SIERRA CLUB, non-
profit corporations,

Petitioners,

vs.

CALIFORNIA DEPARTMENT OF
CONSERVATION, DIVISION OF OIL,
GAS, AND GEOTHERMAL
RESOURCES; and DOES 1 through 20,
inclusive,

Respondents.

AERA ENERGY LLC, BERRY
PETROLEUM COMPANY LLC,
CALIFORNIA RESOURCES
CORPORATION, CHEVRON U.S.A.
INC., FREEPORT-MCMORAN OIL &
GAS LLC, LINN ENERGY HOLDINGS
LLC, and MACPHERSON OIL
COMPANY,

Respondents-in-Intervention.

Case No. RG15769302

Assigned for all purposes to the Hon. George C.
Hernandez, Dept. 17

**NOTICE OF MOTION AND MOTION
FOR SUMMARY ADJUDICATION BY
AERA ENERGY LLC, BERRY
PETROLEUM COMPANY LLC,
CALIFORNIA RESOURCES
CORPORATION, CHEVRON U.S.A. INC.,
FREEPORT-MCMORAN OIL & GAS LLC,
LINN ENERGY HOLDINGS LLC, AND
MACPHERSON OIL COMPANY ;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF**

*[Declaration of Matthew Wickersham and
Separate Statement of Undisputed Facts, filed
concurrently; Proposed Order, lodged
concurrently]*

Date: March 3, 2016
Time: 2:30 p.m.
Dept.: 17
Reservation No.: 1693517

Action Filed: May 7, 2015
Trial Date: None set

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 PLEASE TAKE NOTICE that on March 3, 2016, at 2:30 p.m., or as soon thereafter as counsel
3 can be heard, in Department 17 of the above-mentioned Court, located at 1221 Oak Street, Oakland,
4 California 94612, Respondents-in-Intervention, Aera Energy LLC, Berry Petroleum Company LLC,
5 California Resources Corporation, Chevron U.S.A. Inc., Freeport-McMoRan Oil & Gas LLC, LINN
6 Energy Holdings LLC, and Macpherson Oil Company (collectively "Energy Companies") will and
7 hereby do move for summary adjudication in their favor, pursuant to Code of Civil Procedure section
8 437c, subdivision (f), against the First Cause of Action in the Complaint for Declaratory and Injunctive
9 Relief and Verified Petition for Writ of Mandate, filed on May 7, 2015, by Plaintiffs Center for
10 Biological Diversity and Sierra Club (collectively, "Petitioners") on the following grounds:

- 11 • Petitioners' First Cause of Action has no merit because, when combined with Petitioners'
12 Second Cause of Action for a writ of mandate in the Complaint, no actual controversy
13 exists between the parties to justify declaratory relief.

14 This Motion is based upon this Notice, the attached Memorandum of Points and Authorities, the
15 separate statement of undisputed facts, the declaration of Matthew C. Wickersham and the exhibits
16 attached there to, all pleadings, records, and files herein, those matters of which the Court may take
17 judicial notice, and such oral argument as the Court may permit.

18 Respectfully submitted,

19 Dated: December 14, 2015

GIBSON, DUNN & CRUTCHER, LLP

21 By: _____

22 Jeffrey D. Dintzer

23 Attorneys for Respondents-in-Intervention,
24 AERA ENERGY LLC, BERRY PETROLEUM
25 COMPANY LLC, CALIFORNIA RESOURCES
26 CORPORATION, CHEVRON U.S.A. INC.,
27 FREEPORT MCMORAN OIL & GAS LLC, LINN
28 ENERGY HOLDINGS LLC, and MACPHERSON OIL
COMPANY

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I. INTRODUCTION

In this case, Petitioners have pled two causes of action that raise identical, redundant issues regarding the duties of the California Department of Conservation, Division of Oil, Gas & Geothermal Resources (“DOGGR”) under the federal Safe Drinking Water Act (“SDWA”). Petitioners may not proceed to trial on a declaratory relief cause of action when Petitioners have simultaneously petitioned for a writ of mandate covering the same issues and underlying subject of controversy. Because Petitioners’ declaratory relief cause of action is unnecessary and superfluous, and only risks the possibility of a needless trial with live witnesses, it should be summarily dismissed.

In the first cause of action for declaratory relief, Petitioners allege that DOGGR failed to identify sufficient justifications for the issuance of emergency Aquifer Exemption Compliance Schedule Regulations. According to Petitioners, the “true emergency” is that DOGGR has ignored its non-discretionary duties to prohibit all so-called “illegal injections” under the SDWA. Because DOGGR is allegedly ignoring its duties under the SDWA, Petitioners conclude that DOGGR cannot claim the regulations are justified by an emergency. In the second cause of action, Petitioners rely on the same alleged duties under the SDWA to petition this Court for a writ of mandate ordering DOGGR to immediately prohibit all alleged “illegal injections” in California. The subject of controversy underlying the second cause of action is identical to the first cause of action: whether DOGGR has fulfilled its alleged duties under the SDWA by promulgating the emergency regulations. Under both causes of action, Petitioners are requesting that this Court void the regulations and require DOGGR to take actions that Petitioners deem appropriate. Petitioners want two bites at the same apple, when one is sufficient.

Further, while the writ of mandate cause of action would be tried according to an administrative record prepared by DOGGR, Petitioners’ declaratory relief cause of action would open the door to an unpredictable variety of extra-record evidence unnecessary to the disposition of the actual controversy. In fact, trial on the first cause of action raises the prospect of eye-witness testimony; something that is unnecessary given that the controversy here involves allegations of improper actions of a state regulatory body. Review of such actions is done after the timely filing of a petition for writ of mandate, which Petitioners have filed. The mere presence of both causes of

1 action creates significant procedural uncertainty, even though the actual controversy can be
2 completely disposed of by the writ claim.

3 Given the existence of the petition for writ of mandate, Petitioners cannot identify an actual
4 controversy, which is an essential element of the declaratory relief cause of action. Lacking an
5 essential element of declaratory relief, this Court should summarily adjudicate the first cause of
6 action in favor of the Energy Companies. Moreover, the Court should exercise its statutory discretion
7 to summarily adjudicate this unnecessary and improper declaratory relief claim.

8 II. STATEMENT OF FACTS

9 In California, Class II underground injection wells are regulated by DOGGR pursuant to a
10 Memorandum of Agreement between DOGGR and the EPA. (Separate Statement of Undisputed
11 Facts (“UF”) No. 1.) Recently, the EPA has raised questions regarding DOGGR’s administration of
12 the Underground Injection Control program. (UF No. 2.) Following numerous meetings and
13 sustained dialogue with the EPA, DOGGR formally responded to the EPA’s audit on February 6,
14 2015. (UF No. 3.) Among other actions, DOGGR proposed to “initiate rulemaking to establish a
15 regulatory-compliance schedule to eliminate Class II injection into undisputedly non-exempt aquifers
16 statewide.” (UF No. 4.) This rulemaking came to fruition when DOGGR promulgated its emergency
17 Aquifer Exemption Compliance Schedule Regulations on April 1, 2015. (UF No. 5.)

18 On May 7, 2015, Petitioners filed their Complaint for Declaratory and Injunctive Relief and
19 Verified Petition for Writ of Mandate (“Petition”) with two causes of action intended to nullify the
20 Aquifer Exemption Compliance Schedule Regulations. (UF No. 6.) First, Petitioners are seeking
21 declaratory relief under the California Administrative Procedure Act based on allegations that the
22 Aquifer Exemption Compliance Schedule Regulations were not justified by a true emergency. (UF
23 No. 7.) Second, Petitioners have requested a writ of mandate “ordering DOGGR to take all actions
24 necessary and available to it to immediately meet its non-discretionary duties [under the SDWA] to
25 prohibit illegal injection of wastewater into protected aquifers.” (UF No. 8.) As discussed further
26 below, both of Petitioners’ causes of action rely entirely upon the argument that the true emergency is
27 DOGGR’s alleged failure to fulfill its obligations under the federal SDWA. (UF No. 11.)
28

III. STANDARD OF REVIEW

The procedure for a motion for summary adjudication is identical to that for a motion for summary judgment. (Code Civ. Proc. § 437c, subd. (f)(2); see also *Toigo v. Town of Ross* (1998) 70 Cal.App.4th 309, 324 .) “In order to establish an entitlement to summary adjudication, the moving party must establish that a cause of action is without merit by negating an essential element” (*Toigo, supra*, 70 Cal.App.4th at p. 324.) It is not necessary for the Energy Companies to “conclusively negate an element of the plaintiff’s cause of action; rather, all that the defendant need do is show that one or more elements of the cause of action cannot be established by the plaintiff.” (*Gafcon, Inc. v. Posnor & Assocs.* (2002) 98 Cal.App.4th 1388, 1401, quoting *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853.)

Summary adjudication of declaratory relief claims is appropriate “in a proper case.” (*Gafcon, Inc., supra*, 98 Cal.App.4th at p. 1401.) The application of summary adjudication to “declaratory relief lies in the trial court’s function to render such a judgment when only legal issues are presented for its determination.” (*Id.* at p. 1402.) When summary adjudication of Petitioners’ declaratory relief claim is proper, this Court should order that “that [petitioners] are not entitled to the declarations in their favor.” (*Ibid.*)

IV. ARGUMENT

A. Petitioners’ Request for Writ of Mandate Extinguishes Any Actual Controversy, Thereby Negating an Essential Element of the Declaratory Relief Cause of Action.

The Energy Companies are entitled to summary adjudication of Petitioners’ first cause of action for declaratory relief because, when combined with Petitioners’ second cause of action petitioning for writ relief, Petitioners have not identified an actual controversy between the parties. Because an actual controversy is an essential element of declaratory relief, no triable issue exists justifying declaratory relief and summary adjudication is warranted. (Code Civ. Proc. § 437c, subd. (f).) The Energy Companies’ Motion is aligned with the policies underlying the “summary adjudication of issues [] to ‘promote and protect the administration of justice, and to expedite litigation by the elimination of needless trials.’” (*Hood v. Superior Ct. et al.* (1995) 33 Cal.App.4th 319, 323, quoting *Lilienthal & Fowler v. Superior Ct.* (1993) 12 Cal.App.4th 1848, 1854.) Because

1 the actual controversy at the heart of the declaratory relief claim is fully engaged by the petition for
2 writ of mandate, this Court should act now to adjudicate the first cause of action in favor of the
3 Energy Companies.

4 **1. To Avoid Summary Adjudication, Petitioners Must Present an Actual**
5 **Controversy.**

6 To establish a triable issue regarding declaratory relief, Petitioners must raise a controversy
7 “that is the subject of declaratory relief . . . which admits of specific and conclusive relief by
8 judgment within the field of judicial determination, as distinguished from an advisory opinion upon a
9 particular or hypothetical state of facts.” (*Gafcon Inc.*, *supra*, 98 Cal.App.4th at p. 1403.) Thus,
10 Petitioners must demonstrate an “actual controversy” between the parties. “The principle that courts
11 will not entertain an action which is not founded on an actual controversy is a tenet of common law
12 jurisprudence. . . . A controversy is ‘ripe’ when it has reached, *but has not passed*, the point that the
13 facts have sufficiently congealed to permit an intelligent and useful decision to be made.” (*Ibid.*,
14 emphasis in original, citation omitted.) The Petition appropriately recognizes that an “actual
15 controversy” is an essential element of the declaratory relief cause of action. (UF No. 9.)

16 Declaratory relief is “unnecessary and superfluous”—and thus fails to resolve an actual
17 controversy—when “[t]he issues invoked in that cause of action already were fully engaged by other
18 causes of action.” (*Hood*, *supra*, 33 Cal.App.4th at p. 324.) Indeed, the “declaratory relief statute
19 should not be used for the purpose of anticipating and determining an issue which can be determined
20 in the main action.” (*Ibid.*, citation omitted.) Rather, “[t]he object of the statute is to afford a new
21 form of relief where needed and not to furnish a litigant with a second cause of action for
22 determination of identical issues.” (*Ibid.*, citation omitted.) “Even where a particular matter is an
23 inherently proper subject of declaratory relief, a declaratory judgment may not be rendered to such a
24 matter in disregard of the customary limitations upon the granting of such relief.” (*Gafcon Inc.*,
25 *supra*, 98 Cal.App.4th at p. 1403–04, citation and internal alterations omitted.)

1 **2. The Subject of Controversy of Petitioners' Declaratory Relief Cause of Action is**
2 **Fully Engaged by the Petition for Writ of Mandate.**

3 Because the declaration of rights sought by Petitioners is a necessary part of the writ of
4 mandate cause of action, the declaratory relief cause of action is "fully engaged" by the mandamus
5 claim, thereby rendering declaratory relief "unnecessary and superfluous." (*Hood, supra*, 33
6 Cal.App.4th at p. 324.) Absent identification of a controversy not engaged by the petition for writ of
7 mandate, Petitioners' declaratory relief claim lacks the "actual controversy" element required to
8 avoid summary adjudication.

9 Despite raising two causes of action in two distinct procedural postures, Petitioners' claims
10 seek resolution of the same, underlying controversy: whether DOGGR's promulgation of the Aquifer
11 Exemption Compliance Schedule Regulations satisfies DOGGR's duties under the federal SDWA.
12 Even though Petitioners allege that declaratory relief is proper because DOGGR did not identify a
13 proper "emergency" justifying the regulations, the alleged lack of "emergency" exclusively derives
14 from DOGGR's duties under the federal SDWA, which is an issue fully engaged by the petition for
15 writ of mandate. Regarding the first cause of action, Petitioners allege that DOGGR has flouted the
16 Administrative Procedure Act "by employing regulatory emergency powers to allow admittedly
17 illegal injection." (UF No. 10.) Petitioners further allege that "[t]he true emergency is the ongoing
18 contamination of California's underground supply of water [and that] DOGGR has a
19 nondiscretionary duty and legal authority to prevent [the alleged contamination]." (UF No. 11.)
20 Based on this alleged "true emergency," Petitioners seek the prohibition of "further illegal
21 contamination under the guise of DOGGR's sham 'emergency' regulatory scheme." (UF No. 12.)
22 Petitioners have asked this Court to "vacate the emergency regulations" based entirely on the fact that
23 "DOGGR continues to fail in implementing its regulatory duties." (UF No. 13.) To justify
24 declaratory relief, Petitioners similarly allege that they will be "irreparably harm[ed]" because of
25 "DOGGR's failure to enforce and comply with the law and because of the ensuing environmental
26 damage caused by DOGGR's illegal authorization of oil wastewater injection into protected
27 aquifers." (UF No. 14.)
28

1 Petitioners have further confirmed the complete overlap of the two causes of action at
2 hearings on the Motion for Preliminary Injunction and the Demurrers. Petitioners explained that the
3 “first cause of action” for declaratory relief is about the “legal framework for review,” which is
4 alleged to be “review first before allowing anything to go into a protected aquifer.” (UF No. 15.)
5 Petitioners further described the “crux of the case” as Petitioners’ “concern that injections are
6 occurring into protected aquifers where no exemptions have been obtained.” (UF No. 16.)
7 Significantly, Petitioners even admitted that the declaratory relief cause of action “could be a cause of
8 action for our second claim” for mandamus relief. (UF No. 17.)

9 Petitioners will likely respond that the first cause of action not only challenges DOGGR’s
10 duties under the federal SDWA, but also the “emergency findings themselves.” (UF No 18.) In this
11 case, that is a distinction without a difference. Petitioners are not claiming DOGGR’s justifications
12 for emergency rulemaking are facially inadequate, but instead that the “true emergency” derives from
13 DOGGR’s alleged failure to fulfill its obligations under the federal SDWA. (UF No. 11.)

14 More specifically, Petitioners have challenged DOGGR’s emergency findings that an
15 immediate cessation of underground injection activities in California would (1) cause an “abrupt
16 disruption” to the oil industry in California and (2) jeopardize the federal government’s ongoing
17 approval of the State’s UIC Program.” (UF No. 19.) Beyond vaguely asserting that these findings do
18 not address the public welfare, health or safety, Petitioners have provided no substantive basis for this
19 assertion. (UF No. 20; see also UF Nos. 21 & 22.) Instead, Petitioners have readily admitted that
20 their actual “position is [that] the real public health emergency is the drought and the harm caused by
21 the regulations allowing continued contamination of these underground sources of drinking water.”
22 (UF No. 23.) Petitioners further stressed to this Court that “notwithstanding any deference the Court
23 gives to the finding of the emergency regulations, the regulations violate the [SDWA] . . . and that
24 fundamental flaw means regulations can be struck down no matter what.” (UF No. 24.)

25 Due to the identical issues underlying both causes of action, Petitioners have failed to identify
26 a present, actual controversy necessary to justify a claim for declaratory relief. Because the only
27 issue raised in their declaratory relief claim “can be determined in the main action,” Petitioners
28 cannot move forward with their declaratory relief claim. (*Hood, supra*, 33 Cal.App.4th at p. 324; see

1 also *Meyer v. Spectrum LP* (2009) 45 Cal.4th 634, 648 [controversy at issue insufficient to justify
2 declaratory relief because such relief “would have little practical effect in terms of altering parties’
3 behavior”].) Once this Court rules on the issues underlying Petitioners’ second cause of action, the
4 point will have passed for a “useful decision to be made” on the first cause of action. (*Gafcon Inc.*,
5 *supra*, 98 Cal.App.4th at p. 1403.) Absent an actual, independent controversy justifying declaratory
6 relief, this Court should summarily adjudicate the declaratory relief cause of action in favor of the
7 Energy Companies.

8 **3. Petitioners Have No Right to Seek Declaratory Relief in the Alternative where a**
9 **Petition for Writ of Mandate is the Proper Vehicle to Seek Relief.**

10 In the abstract, Petitioners’ challenge to the emergency regulations might be “an inherently
11 proper subject of declaratory relief.” (*Gafcon Inc.*, *supra*, 98 Cal.App.4th at pp. 1403-04.)
12 Government Code section 11350, cited by Petitioners in the first cause of action, provides that “[a]ny
13 interested person may obtain a judicial declaration as to the validity of any regulation . . . by bringing
14 an action for declaratory relief in the superior court in accordance with the Code of Civil Procedure.”
15 This section specifies that Petitioners may challenge the propriety of an “emergency regulation . . .
16 upon the ground that the facts recited in the finding of emergency . . . do not constitute an
17 emergency.” (Gov. Code § 11350, subd. (a).) Indeed, the Energy Companies recognize that an
18 action for declaratory relief is cumulative (see Code Civ. Proc. § 1062) and declaratory relief is not
19 “intended to be exclusive or extraordinary, but alternative and optional.” (*Jones v. Robertson* (1947)
20 79 Cal.App.2d 813, 819–20.)

21 But despite this broad language, the declaratory relief statutes are still subject to the
22 “customary limitations upon the granting of such relief.” (*Gafcon Inc.*, *supra*, 98 Cal.App.4th at p.
23 1403–04.) California courts have long-recognized that this Court may deny declaratory relief on the
24 grounds “that the asserted alternative remedies are available to the plaintiff and that they are speedy
25 and adequate or as well suited to the plaintiff’s needs as declaratory relief.” (*Jones v. Robertson*,
26 *supra*, 79 Cal.App.2d at p. 820, citation omitted; see also *Columbia Pictures Corp. v. De Toth* (1945)
27 26 Cal.2d 753, 761.) Petitioners not only have mandamus remedies available, but they have also
28 requested those remedies through the second cause of action from the outset of the litigation. “Where

1 the court believes that more effective relief can be granted through another procedure, it will be
2 justified in refusing a request for declaratory relief.” (*Guilbert v. Regents of U. of Cal.* (1979) 93
3 Cal.App.3d 233, 245.)

4 **B. This Court Should Exercise Statutory Discretion to Summarily Adjudicate Plaintiffs’**
5 **First Cause of Action Because Declaratory Relief Is Neither Necessary nor Proper.**

6 In addition to Petitioners’ failure to effectively plead an “actual controversy” essential to the
7 declaratory relief claim, summary adjudication is warranted because declaratory relief is “not
8 necessary or proper” to resolve this case. (Code Civ. Proc. § 1061.) As dictated by the declaratory
9 relief statute relied on by Petitioners, an action for declaratory relief must be made “in accordance
10 with the Code of Civil Procedure.” (Gov. Code § 11350, subd. (a).) The Code of Civil Procedure
11 specifically provides this Court with discretion to dismiss claims for declaratory relief when the
12 Court’s “declaration or determination is not necessary or proper at the time under all circumstances.”
13 (Code Civ. Proc. § 1061.) While the discretion granted to this Court to deny declaratory relief is “not
14 unlimited,” discretion may be exercised “when there is a basis in fact for the conclusion that the
15 declaration is not necessary or proper.” (*Warren v. Kaiser Fdn. Health Plan, Inc.* (1975) 47
16 Cal.App.3d 678, 683, citing *Columbia Pictures Corp.*, *supra*, 26 Cal.2d at p. 762.) In this litigation,
17 declaratory relief is neither necessary nor proper.

18 As discussed previously, Petitioners have failed to offer any reason why declaratory relief is
19 necessary or proper, given the existence of the cause of action for a writ of mandate. Petitioners have
20 repeatedly emphasized—in their pleadings and at hearings—that the “crux of the case” is Petitioners’
21 “concern that injections are occurring into protected aquifers where no exemptions have been
22 obtained.” (UF No. 16.) Already, Petitioners have proposed the possibility of bifurcated records on
23 the two causes of action. (UF No. 25.) By attempting to bifurcate their causes of action on the same
24 underlying controversy, Petitioners only risk “needless trials” in contravention of the declaratory
25 relief statute. (*Hood, supra*, 33 Cal.App.4th at p. 323.) Such an outcome is wholly improper in this
26 setting. The California Supreme Court has made clear that “extra-record evidence is generally not
27 admissible in traditional mandamus actions.” (See *Western States Petroleum Assn. v. Superior Ct.*
28 (1996) 9 Cal.4th 559, 576.) There are no “unusual circumstances” present to justify the introduction

1 of extra-record evidence in this proceeding. (*Id.* at p. 578.) But the declaratory relief cause of action
2 would allow Petitioners to introduce such evidence, including eye-witness testimony, which far
3 exceeds the “very limited purposes” identified by the Supreme Court. (*Ibid.*) This Court should
4 exercise its statutory discretion to summarily adjudicate Petitioners’ declaratory relief cause of action
5 in favor of the Energy Companies.

6 **V. CONCLUSION**

7 For the foregoing reasons, the Energy Companies respectfully request that the Court
8 summarily adjudicate the First Cause of Action in the Complaint for Declaratory and Injunctive
9 Relief and Verified Petition for Writ of Mandate in favor of the Energy Companies.

10 Respectfully submitted,

11 Dated: December 14, 2015

GIBSON, DUNN & CRUTCHER, LLP

12
13 By:  _____

14 Jeffrey D. Dintzer

15 Attorneys for Respondents-in-Intervention,
16 AERA ENERGY LLC, BERRY PETROLEUM
17 COMPANY LLC, CALIFORNIA RESOURCES
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